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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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Amendments of Parts 1, 2 and	)	PR Docket No. 92-80
21 of the Commission's Rules	)	RM Docket No. [illegible]
Governing the Use of Frequencies	)	
In the 2.1 and 2.5 GHz Band	)	

COMMENTS OF BAYPOINT TV, INC.

Comes now Baypoint TV, Inc. ("Baypoint"), and files its Comments in the captioned proceeding in response to the Commission's Notice of Proposed Rulemaking ("NPR"), released May 8, 1992 (FCC 92-173).

Baypoint's Interest in This Matter

Baypoint was a 1983 applicant for MMDS frequencies in several markets. Subsequently, Baypoint's applications were tentatively selected in several markets and Baypoint is currently the licensee of operating MMDS facilities which are leased to wireless cable operators and a remaining 1983 applicant with modification applications pending. One of Baypoint's four principals is a wireless cable entrepreneur who has a significant interest in the development of a major wireless cable operation in the Tidewater, Virginia area for which more than 20 MMDS, ITFS and

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OFS channels have been leased. Two of Baypoint's four principals are legal and engineering professionals who have been actively engaged in representation of MMDS, ITFS and OFS applicants. Thus, Baypoint and its principals have been engaged in virtually every aspect of development of the wireless cable business.

Overview of Development of the Wireless Cable Business

Wireless cable is a developing niche business which can provide technical quality, price and service competition to the conventional cable business. However, it is not fully competitive with cable because of its propagation characteristics (i.e., line-of-sight) and the limitation on the number of channels that is available vis-a-vis a state of the art cable system.[1]/

Since 1983, when the Commission first envisioned the use of MMDS channels a cable competitive service to today, the wireless business has been beset by the following significant problems:

1) Programming Availability. This problem alone stymied the development of the business for several years because much of

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[1]/ Channel capacity may be a transitory problem for the wireless cable business. Channel compression and digital technology may substantially increase the finite number of microwave channels available to the wireless cable business useable for multichannel video distribution. Indeed, compression technology is currently available from at least one supplier, Comband Technologies, Inc., and it appears that other suppliers are nearing the point of marketing digital and compression transmission and receive equipment.

the programming routinely available to cable was not available to wireless. Despite failure of the Congress to pass legislation mandating the availability on a competitive basis of this programming (a result which is still necessary), programming is generally available to well funded wireless cable operators and, indeed, a recent development in the business has been the buy-in by cable operators into the wireless business.

2) Unavailability of Capital. While the wireless business is still not "bankable" in the sense that conventional lending is available, the economic success of several wireless businesses have generated investor capital and funding is now available in selected circumstances.

3) Channel Availability. The FCC plan for consolidation of sufficient frequencies for wireless cable operation (generally perceived to be 20 or more per market) from three different services is workable in practice and theory but it has bogged down and, as the NPR in this proceeding acknowledges, needs to be streamlined.

Presently all MMDS applications are processed in the Domestic Facilities Division of the Common Carrier Bureau and all ITFS applications are processed in the Video Services Division of the Mass Media Bureau. At the outset we wish to make clear that the processing staff of each of these Divisions are excellent in

both their technical knowledge and their commitment to fostering the new business of wireless cable. The problem is the process.

The single greatest problem faced by the Commission is the multiple filing by application mills of thousands of identical mutually exclusive applications. Under the Commission's first-come, first-serve policy of accepting and cutting off the first application filed for an unserved area, a single application could be filed, cut-off and granted. The application mills have created a business in which potential applicants are advised that large economic gains similar to that experience by cellular applicants a decade ago are available to MMDS applicants. They are then charged thousands of dollars for preparation and filing of non-exclusive applications for an unserved area. Whatever number of applicants the mill is able to generate for a particular filing are then filed on the same day thus creating a mutually exclusive situation requiring a lottery. Finally, the mill generates a "settlement" in which each of the applicants receives a pro rata (sometimes 1% or 2%) interest in the surviving applicant and the mill or its nominee obtains the right to provide management in other services.

The resulting thousands of MMDS applications that have been filed is the single largest problem facing the Commission. We take no position on how this problem should be solved and we understand that other agencies such as the Federal Trade Commission

are involved in determining whether such business practices have been lawfully conducted. However, before the Commission can structure any program to streamline the processing of microwave applications, it must confront the application mill problem. There simply is no solution to the other problems faced by the Commission unless and until this problem is resolved.

Initial Processing of MMDS Applications[2]/

The Commission seeks comment on whether processing of MMDS applications should remain in the Common Carrier Bureau and/or moved to the Mass Media Bureau or the Private Radio Bureau. In paragraph 8 of the NPR the Commission specifically asks whether there is any remaining functional distinction between common carrier and non-common carrier status for MMDS. Clearly there is none and virtually all frequencies available for wireless operation are not available on a common carrier basis whether or not the licensee has specifically requested non-common carrier status. Thus, there is no inherent reason for continuation of Part 21 regulation. Second, the Commission inquires whether the use in wireless systems is compatible with Part 94 regulation. While technically wireless operation could be squeezed into Section 94.9's permissible operations, the actual use is not really compatible with those purposes. Clearly, the actual use is most

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[2]/ Reference here to "MMDS" encompasses single channel MDS, MMDS and former OFS channels.

compatible with Part 74 and Part 76 regulation in the Mass Media Bureau. Thus, Mass Media Bureau regulation seems most compatible with the Commission's regulatory scheme. Practical considerations, discussed infra, also dictate this result.

Interrelated is the question whether an interference standard or mileage separation standard should be applied to these applications and if a new mileage standard is applied, what should become of existing applications. The Commission does have experience with use of a mileage separation standard for acceptability of the H Channels which was previously administered by the Private Radio Bureau at its Gettysburg, Pennsylvania branch. It is believed that the Gettysburg experience is seen within the FCC as a successful operation because a large number of applications were processed on an expeditious basis and processing staff is available which could be used for expanding the previous operation to include processing and possible regulation of MMDS. Apparently, there is no serious sentiment at this time for moving the processing of ITFS applications from the Mass Media Bureau to the Private Radio at Gettysburg.

Movement of the MMDS frequencies to Private Radio and of processing to Gettysburg with a fixed mileage separation standard does have some appeal. However, that appeal is limited to the fact that applications could be processed on a fast track basis, i.e., the mileage separation either is met or not and, possibly,

voluntary agreement to short-spacing and terrain blockage could be considered. The problem is that at this stage in the development of the wireless business, fixed mileage separation does not coincide with the way the business has developed and will develop in the future and regulation of MMDS by Private Radio while ITFS remains at Mass Media will inevitably result in further regulatory chaos.

Historically, the Commission chose to allow the development of wireless cable on a market by market basis, i.e., allowing eight MMDS channels in each of the metropolitan statistical areas (MSA). MSAs do not, of course, coincide in any fashion with a mileage separation standard. In some cases facilities are located closer than 50 miles and in some cases farther. The industry has developed several flexible techniques for avoiding interference such as demonstration of terrain blockage or directional antennas in those cases where transmitting points in nearby MSAs would otherwise cause interference. The interference standards utilized by both ITFS and MMDS applicants, while somewhat cumbersome, have effectively allowed development of wireless on a market by market basis. It is, simply stated, too late in the game to switch to a mileage separation standard.

Indeed, the draconian effect of such switch is clearly implicated in footnote 25 of the NPR where the Commission anticipates dismissal of all applications filed since 1983, which

cannot meet a mileage separation standard if adopted. The net effect of adoption of the mileage separation standard would be to lessen the number of channels available to a number of wireless operators. This significantly impedes the development of the wireless cable business because the number of channels which may be aggregated in the best of circumstances (33) is near the minimal amount of channels necessary for operation of a viable wireless system. To reduce the number of frequencies available would, thus, be counterproductive.

We do, however, recognize that processing changes may be necessary. Retention of the MMDS frequencies in the Common Carrier Bureau does not seem to be a logical option. The frequencies are used in a mass media service and their use must be coordinated with that of ITFS located in the Mass Media Bureau. Common sense dictates that the location of the MMDS frequencies to Mass Media is the best result. That way the "one stop shopping" approach to frequency application and processing could actually be implemented with a single engineering staff reviewing all applications used in the wireless business.[3]/ A practical solution may be that interim processing of applications (i.e., logging in and public notice) of all MMDS and ITFS applications be done at Gettysburg and then sent to the Mass Media Bureau for processing. This would give effect

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[3]/ At present one of the largest problems faced by wireless operators is the need to obtain authorization for ITFS and MMDS frequencies from different staffs utilizing different processing and interference procedures.

to the recognized abilities of both staffs.

Baypoint believes that the following procedures may be best suited to development of the wireless business:

1) A single consolidated staff should be established to handle ITFS and MMDS. The present engineering and legal staffs in the Domestic Facilities and Video Services Divisions assigned to MMDS and ITFS processing should be preserved to maximum extent possible. A single administrator should oversee this staff in the Video Services Division.

2) MMDS should be moved from Common Carrier to Mass Media Bureau with possible preliminary processing by the Private Radio Bureau at Gettysburg.

3) The database including all pending ITFS and MMDS applications should be completed immediately and before further MMDS and ITFS new facility applications are accepted. The database should include MDS, MMDS, ITFS and the H Channels previously regulated by the Private Radio Bureau. A base date should be chosen at which point the data is complete including modification applications. Thereafter, the database should never be more than 30 days behind filing dates.

4) New processing procedures should be adopted pursuant

to which within a stated time after public notice of the filing of an MMDS or ITFS application for modification or new facilities, the applicant must certify that it complied with the interference standards as of the date the application was filed. This would allow the applicant to search the database to the date of filing and certify that it was in compliance as of the filing date, and thus shift the burden of establishing compliance with the interference standards from the staff to the applicant.

5) Discontinuance of settlement agreements among competing applicants for new MMDS facilities.

6) Strict adherence to eligibility standards for ITFS applicants.

Finally, it is imperative that the Commission adopt and implement the procedures that will be in force for the frequencies used in wireless operation at the earliest possible moment. As noted above, wireless is a niche business and is widely perceived that there is a limited window of opportunity during which it will become economically competitive with the cable business. Delay, in itself, can result in substantial prejudice in development of the wireless business. Baypoint urges that the Commission conclude this proceeding on an expedited basis.

Respectfully submitted,

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By: _____
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June 29, 1992

Certificate of Service

I, Sherry L. Schunemann, a secretary in the law office of Baypoint TV, Inc., do hereby certify that a copy of the foregoing "Comments of Baypoint TV, Inc." were hand delivered this 29th day of June, 1992 to the following:

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